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3. Epilogue: Yes, Virginia, there will always be a law of torts
(or will there?)

Note on The New Zealand Accident Compensation Act (ACA)
[1975] 2 N.Z. Stat. 1409

Anyone injured in any kind of accident in New Zealand, irrespective of the cause, is entitled by the ACA to claim compensation from the Accident Compensation Commission. Under the Act, no claim, whether at common law or under a statute, may be brought for damages that arise out of personal injury or death caused by accident in New Zealand. The Act (A) embodies a distinct idea of social responsibility and (B) constitutes a detailed scheme to put that idea into practice in the sphere of accident compensation.

A. The Idea of Social Responsibility

The two big components of that idea are 1. "Real Compensation" and 2. "community responsibility"

1. REAL COMPENSATION

The Act aims at the REPLACEMENT OF SOMETHING LOST rather than at public charity based on need. In order to establish the existence of a legally recognized loss, it is no longer necessary to discover an individual (the proper defendant) with a duty to exercise care in the particular interpersonal context in which the accident occurred. What alone counts is whether or not there has been personal injury or death, caused by or sufficiently connected with, the existence of an accident. The Act has retained the common law method of measuring the losses which are covered by it: The goal is to put the victim in a position equal to his condition prior to the injury, i.e. to fill the gap (loss) created by the accident. The spirit of the Act is expressed in the following words of the Woodhouse Report *:

"Few would attempt to argue that injured workers should be treated by society in different ways depending upon the cause of injury." [Royal Commission of Injury Compensation for Personal Injury in New Zealand, 1967 para. 6]

The reader will observe that if the "cause" itself of injury OUGHT to be irrelevant, then whether the personal injury is the result of accident, or something else (e.g. illness, intentional wrong) ought to be irrelevant. The universal thrust of the Act's spirit must be judged in the light of the types of losses that are compensated as opposed to those which are not.

2. COMMUNITY RESPONSIBILITY

The ACA returns to the earlier, pre-fault common law theory of:

* This report provided the conceptual framework for ensuing legislation.

responsibility based on causation alone, but, in addition, builds upon the premise that society as a whole is the relevant agent of most accident-producing activities. In other words, the individual, qua isolated and discrete actor, is no longer conceived to be causally significant. He is causally effective only as constituting a part of an irreducible complex structure of social relations mediated by the use of instruments and machinery. It is this structure, which, as it is a determining presence even in the most limited and localized accident situation, is therefore accountable for the consequent injury. A drunk man is not nearly as dangerous as a drunk driver. It is the machine and the complex of social relations characteristic of technological society which are responsible for the "inevitable statistical increase in injuries". Consequently, the problem of compensation is no longer resolved as between two litigants in a situation viewed in terms of its own legal merits. Rather, compensation is conceived according to the rule that society itself owes to each and every injured person "real compensation" for the ascertained loss. The real test of the realization of this idea of communal responsibility is the answer to the question: WHO pays for the funds used to compensate victims? The abstract concept of "society's" acting through individuals does not "conjure up funds from its own collective bank account. The money must come from individuals (including businesses and associations) and this re-particularizes the concept of community responsibility in an important way" *

B. The Scheme

1. The Administration of the ACA

The main obligation to administer it is placed on the Accident Compensation Commission, consisting of 3 members, among whom, either the chairman or another must be an experienced lawyer. The Commission is to be independent of governmental control, its staff and members are not deemed to be in the service of the Crown, and any communication from a Minister to it must be made public before the Parliament. There is an elaborate system of reviews and appeals from a Commission decision that is integrated with the Judicial hierarchy. The Commission is obliged to take active steps to advance safety in accident-risk areas and "to promote a coordinated and vigorous programme for the medical and vocational rehabilitation" [ACA Sc. 52] of victims of accidents. It is responsible for all payments of compensation. Since there is no statutory definition of "personal injury by accident" the meaning of the phrase will emerge only from the case law developed by the Commission and by the Courts on appeal. In short, the ACA does away with the CENTRAL role of Judges, Juries and lawyers as well as by-passes the services of insurance companies in the settlement of personal injury claims.

* Richard Gaskens "Tort Reform in the Welfare State: The New Zealand Accident Compensation Act", (1980), 18 Osgoode Hall L.J. 238 at p. 279

2. Categories of Loss Recognized by the ACA:

i) lost earnings during a period of temporary incapacity ACA s. 113

Compensation equals 80% of the amount of the victims's loss of earnings (maximum of \$200/week) less the amount he is able to earn directly from his personal exertions during the same period. The Commission will reduce compensation where the claimant is not trying to work to the extent of his capacity.

ii) Permanent Incapacity

The two variables which determine the amount of compensation are past earnings and the degree of permanent incapacity. The victim receives 80% of permanent loss of earning capacity. All earnings-related compensation ends when the injured person reaches 65 years old at which time he is eligible for ordinary social security benefits.

iii) Non-economic losses

In general, wide discretionary powers are given to the Commission, subject to statutory ceilings on amounts awarded, and precisely defined situations,

- (a) related to permanent loss or impairment of any bodily functions or any part of the body: maximum = \$7,500 in total. Lump sum payments.
- (b) Residual category: loss of amenities or capacity for enjoying life, including loss from disfigurement and for pain and mental suffering including nervous shock and neurosis. ACA s. 120: Here, the Commission establishes the proper compensation in each case as it sees fit. ACA s. 120 (1)
- (c) Expenses (unrelated to loss of earnings): includes medical treatment, drugs etc. to the extent not covered by the Social Security Act, 1964. Furthermore, any person who aids the injured individual may recover "any identifiable actual and reasonable expenses incurred" thereby. ACA s. 121 (2) (b)
- (d) Compensation for dependents after death.
Variables considered are: earnings - related measure (the amount that would have been payable to the deceased had he suffered a total loss of earnings capacity); degree of dependency on deceased; category of dependent (spouse, child, other). Also included are expenses and other losses after death, e.g. funeral expenses.

3. Categories of loss Excluded by the ACA

The major category excluded is injury due to illness, except where it is contracted as a result of accidental personal injury. The Woodhouse Report acknowledged the anomalous nature of this exclusion but argued that other programmes adequately dealt with such situations

until more comprehensive personal injury legislation was enacted. It is noteworthy, that personal injury caused by the natural elements is compensated under the ACA. However, it is difficult to connect the action of nature with the specifically novel circumstances created by technological society. Property loss, economic loss in the nature of contract damages and injuries to personal privacy and reputation are also excluded. Finally, no claims exist for personal injury which a person wilfully inflicts on himself or for death due to suicide, and a claimant (dependent of deceased person) is barred if convicted of the murder or manslaughter of the deceased.

4. Financing the ACA

There are three separate, self-contained fund sources.

i) The Earners' Fund: supported by levies on employers in respect of earnings of employees. Rates can be altered somewhat to penalize employers whose accident records are significantly worse than those of others in the same category of industry. The rates are not determined essentially according to the degree of risk of injury imposed by or accident record of the employer. The fund covers all earners (up to 65 years old) who suffer personal injury by accident in New Zealand. "Earner" includes both employees and the self-employed.

ii) The Motor Vehicle Fund: paid by levies payable in respect of every motor vehicle required to be registered and licensed annually (can differ according to weight and type of vehicle) and by annual levies on ALL holders of drivers' licenses. It covers ALL persons injured by accident caused by or through or in connection with the use of a vehicle in New Zealand.

iii) Supplementary Compensation Fund: paid out of general revenues (taxes) and covers anyone injured by accident in New Zealand who is not covered by the other two funds, i.e. non-earners.

Any increase in the cost of claims by one fund is intended to be met by increases in the contributions levied by that fund and not by resort to general taxation or any other fund.

These detailed provisions ought to be judged in the light of the ACA's concepts of social responsibility and real compensation. In particular we ought to consider whether the ACA's mode of financing is consistent with its view of collective responsibility and its rejection of cost distribution determined by market mechanisms. (In fact, the choice of this mode of financing was dictated by political considerations.) What criteria are appropriate to apportion community responsibility among individuals? Are the exclusions of certain categories of loss justified?

For further details see:

- (1) R. Gaskins: "Tort Reform in the Welfare State: The New Zealand Accident Compensation Act." in (1980) Osgoode Hall L.J. 238

- (2) D.R. Harris: "Accident Compensation in New Zealand: A Comprehensive Insurance System".
in (1974) 37 MLR 361
- (3) ~~Terence G.~~ Ison, Accident Compensation (1981)

